Supreme Court, U.S.
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No. 99-1391

IN THE
SUPREME COURT OF THE UNITED STATES

ROSA COVINGTON PACKARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

ROSA COVINGTON PACKARD has petitioned this Court for a writ of certiorari to review the order of the Second Circuit denying her appeal from a Connecticut district court decision in a tax refund action. The decision below upheld an order dismissing petitioner's civil complaint under Fed.R.Civ.P. 12(b)(6). The complaint had sought a refund of certain penalties only -- not of taxes or of interest -- for late payment of income taxes and for failure to make quarterly estimated payments. The lateness resulted solely from petitioner's inability to pay voluntarily, an exercise of her Quaker religious convictions against paying for military activities and war preparation.

In support of her petition, petitioner gave two reasons why certiorari should be granted: (1) to enforce the language of the Religious Freedom Restoration Act and uphold the Congressional policy that federal government agencies must meet a statutory burden of pleading and proof under the "least restrictive means" test before unnecessarily burdening the exercise of sincere religious beliefs -- a burden which the statute plainly makes an affirmative defense, and therefore one which cannot be asserted by motion under Rule 12(b)(6), and (2) to correct the lower courts' departure from this Court's settled precedent under the Free Exercise Clause, which bars disadvantageous treatment of religious reasons where a government agency has been granted discretion to allow exemption from penalties for "good" or "reasonable" cause.

Rather than address forthrightly the reasons presented by the petitioner, the respondent claims that

"[t]his case presents the same questions presented in the petitions for writ of certiorari in *Browne v. United States*, [*cert. denied*, 120 S.Ct. 934 (2000) (No. 99-632)], and *Adams v. Commissioner*, [*cert. denied*, 120 S.Ct. 937 (2000) (No. 99-798).]" Brief in Opposition ("BO") at 3. Respondent then argues that the writ should be denied "[f]or the same reasons that the Court denied the petitions in *Browne* and *Adams*, and for the reasons detailed in our brief in opposition in *Browne* ...." *Id.* at 3-4. Of course, the respondent does not know the "reasons that the Court denied the petitions in" those other cases, as no reasons were announced, so it is impossible to respond to that argument. And most of the contentions presented in opposition to the *Browne* petition were inapposite to this case, partly because of factual and procedural differences which the respondent either overlooks or affirmatively misrepresents. The brief in opposition is therefore entirely unpersuasive.

1. Although the instant case does present one of the issues raised in *Browne* (the First Amendment equal treatment issue), it does not present the other issue advanced in that case. While the petitioners in *Browne* and the petitioner in this case have argued that the Internal Revenue Service's failure to abate various penalties violates both the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") as well as the First Amendment's Free Exercise Clause, the reasons that each petitioner gave for why a writ of certiorari should be granted, as well as factual and procedural differences in the cases, render much of the respondent's opposition in *Browne* inapplicable to this case.

To enhance its position that this case should not be considered on its own merits, the respondent also

restates the Questions Presented in the same terms that it used to oppose the *Browne* petition. That tactic is not inherently improper, so long as the recast question is really a fair statement of the issue or issues in the case. But in this instance it is not. The Questions stated in Ms. Packard's petition are a carefully and accurately framed presentation of the issues that this Court might want to address in the case. The respondent's counterstatement is not only inapposite,[1] but also entirely obscures the legal points presented.

This case does not arise out of an order granting "judgment on the pleadings," as critically misstated by the respondent. BO 3.[2] If it did, the procedural issue which the petition presents first would not arise. A motion to dismiss under Rule 12(b)(6) is not the same as a motion for judgment on the pleadings under Rule 12(c). *Browne* was in fact a 12(c) case; the instant case is not. Thus, the respondent's counterstatement of the Question

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[1] In particular, Ms. Packard's petition does not challenge either "the imposition of federal income taxes" or of "interest." BO i. Her petition quite clearly and specifically *only* challenges the imposition of certain civil penalties, as a careful reading even of the Brief in Opposition reveals.

[2] While conceding the sincerity and religious nature of petitioner's beliefs which underlie her inability to comply without some accommodation, BO 2, respondent nevertheless also misstates the nature of petitioner's objection. Petitioner has never described her inability to pay "voluntarily" as an objection to payments made "without the compulsion of a court order." BO 2. To petitioner, a court order would be no different from a legislative command. Petitioner's religious beliefs prevent her from writing the check if the proceeds would be used for military purposes.

Presented is not accurate, honest, or fair. The first question in the case is precisely the procedural issue stated by petitioner:

> Under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, is the government's asserted inability to further its compelling interest by any means less restrictive of the plaintiff's religious liberty an affirmative defense to be pleaded under Fed.R.Civ.P. 8(c), or may a court grant a Rule 12(b)(6) motion to dismiss the complaint on the unproven basis that the plaintiff's objection, by virtue of being religious in nature, cannot be accommodated?

Petition, at i. Because the *Browne* case was not decided in the district court under Rule 12(b)(6), the petition in that case did not advance any of the arguments interrelating the statutory language of RFRA with the operation of the Federal Rules of Civil Procedure that are advanced in Ms. Packard's petition as arguments for granting certiorari. For these reasons, the respondent's Brief in Opposition misses the mark.

In its *Browne* filing, adopted by the brief in opposition here, the respondent argued that the "decision of the court of appeals [in that case] is correct and does not conflict with any decision of this Court or any other court of appeals." *Browne* BO 5. See also *Browne* BO 11-12 (discussing conflict claim made in *Browne* petition). Unlike the petitioners in *Browne*, however, the petitioner in this case has made no claim that the decision of the court below conflicts with the decision of any other court of appeals. Her principal arguments demonstrating conflict with this Court's decisions -- focusing on such

12(b)(6) cases as *Gomez v. Toledo*, 446 U.S. 635 (1980) (burden of pleading), and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 2143 (1999) (obligation to base decision on facts as pleaded) -- remain unanswered, because the Rule 12(b)(6) issue did not arise in *Browne*.

The respondent argued in *Browne* that because pre-*Smith* cases uniformly rejected Free Exercise claims in tax cases, the court of appeals correctly rejected those petitioners' RFRA claim. *Browne* BO 9-10. By adoption of that brief, respondent argues the same here. While the legislative history of RFRA suggests that courts may sometimes look to pre-*Smith* precedent for guidance, the respondent's reference to cases which fail to follow the procedures and standards mandated by RFRA can provide no guidance at all. See *Browne* BO 10-11.[3]

As this Court has acknowledged in *Smith*, such decisions as *United States v. Lee*, 455 U.S. 252 (1982), only "purported" to apply the *Sherbert* test. 494 U.S. at

[3] The respondent claims, in particular, that these cases demonstrate a settled body of precedent rejecting Free Exercise challenges to the imposition of tax penalties. *Browne* BO 11. In fact, none of these cases raised any of the issues presented by our petition. Only one (*Nelson v. United States*, 796 F.2d 164 (6th Cir. 1986), mis-cited by the respondent) even discusses the statutory basis for abatement of penalties. And *Nelson* is a "frivolous return" case under 26 U.S.C. § 6702, which does not have a "reasonable cause" or "exceptional circumstances" exemption. Moreover, at least one thoughtful district court opinion, applying the test later adopted by Congress in RFRA, did rule in favor of Quaker objectors to voluntary income tax payment. See *American Friends Service Committee v. United States*, 368 F.Supp. 1176 (E.D.Pa. 1973), *rev'd on other grnds.*, 419 U.S. 7 (1974) (per curiam).

883.[4] If courts are permitted to decide RFRA cases by following court opinions which only "purport" to apply the *Sherbert* test, but which in fact do not, then only lip-service will be paid to the accommodations to free religious exercise which Congress has mandated. Only pre-*Smith* cases which apply *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) -- the cases specifically referenced in 42 U.S.C. § 2000bb(b)(1)-- according to their terms and their spirit can properly provide guidance in decisions under RFRA. Moreover, RFRA assigns a specific burden of proof by "evidence," *id.* § 2000bb-2(3) -- an enhancement to the *Sherbert* test, as Judge Noonan has pointed out. See *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996).

By relying exclusively on the *Browne* opposition, respondent ignores the district court's improper invocation of Rule 12(b)(6), which excused the government from offering any evidence to support its purely rhetorical contention that no accommodation is feasible.

2. Respondent's restatement of the questions presented also implies that the First Amendment issue in this case -- an argument for proper construction of the

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[4] The other cases cited by the respondent fare little better. *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989), provides no guidance in RFRA cases, because it also did not require the government to *demonstrate* with evidence the truth of its assertion that the tax system could not survive recognition of religious exceptions. None of the pre-*Smith* cases cited by respondent as approving the imposition of penalties for failing to comply with the tax laws for religious reasons even "purports" to apply a *Sherbert*-type analysis to a claimed exemption from penalties imposed for failure to file or pay taxes (including estimated taxes). *Browne* BO 11.

tax penalty statutes, not an argument that those statutes are unconstitutional -- is something other than what it is. The real question on the merits is stated by petitioner:

> In light of the Free Exercise Clause, does a civil complaint for a refund of tax penalties state a claim on which relief can be granted by averring that the IRS categorically denies statutorily authorized penalty waivers to applicants whose religious convictions, if not accommodated, prevent them from voluntarily making timely payment of income tax, even though the IRS generally gives individualized consideration to taxpayers who allege that circumstances beyond their control impeded timely payment?

The respondent argued in opposition to the *Browne* petition that the petitioners in that case "failed to establish reasonable cause .... Their complaint did not allege that they exercised ordinary business care, that they were unable to pay the taxes, or that undue financial hardship would result from timely paying the taxes in question." *Browne* BO 6. This argument, although adopted by respondent as a reason to deny certiorari in this case, is inapplicable to petitioner Packard.

First, petitioner Packard did allege that she exercised "ordinary business care," as defined in the IRS's own regulation, by placing the full amount of unpaid tax in escrow. Thus, unlike the Brownes, she was entitled to a penalty abatement under the plain language of 26 C.F.R. § 301.6651-1(c)(1) (Appx. D6), *see* Pet. 25, and was denied it solely because her impetus was religious in nature, as expressly provided in another IRS regulation.

Id. § 601.106(b) (Appx. D7); *see* Pet. 26. A more blatant violation of the equal-treatment doctrine under the Free Exercise Clause, as interpreted in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality), and *Employment Division v. Smith*, 494 U.S. 872, 886 (1990), could hardly be imagined.

Second, it is irrelevant whether "undue financial hardship would result from timely paying the taxes in question," because the regulation requires only "undue hardship" -- the insertion of "financial" into the criterion is an invention of respondent's counsel. *See* Pet. 25-26; Appx. D3, D5. The respondent's demand that the "hardship" be financial and not religious in nature is simply another manifestation of its disregard of the *Sherbert/Roy/Smith* principle.

The respondent also argued in *Browne* that the determination of the petitioners in that case not to pay federal income taxes did not have a "reasonable cause," because a "decision not to pay taxes that is based on a religious or other belief is not '[a] factor[] beyond the taxpayer's power to control.'" *Browne* BO 7 (bracketed insertions as in original). This argument is not persuasive. The respondent's refusal to acknowledge how religious beliefs involve forces beyond the control or understanding of human beings is unsupported by case law, evidence, human experience, or logic. *Browne* BO at 7; *see also* cases cited and discussion in Petition, at 28 n.16; Amicus Brief of New York Yearly Meeting of Religious Society of Friends, *passim* (discussing long history of Quaker obedience to demands of faith, and of American governments' accommodations of Friends' objections). Moreover, the complaint in this case, which must be accepted as true for present purposes, alleged

that petitioner's beliefs actually "prevent" her from paying voluntarily. *See* Pet. 27-28.

Next, the respondent argued in *Browne* that "the Free Exercise Clause does *not* require the United States to grant an exemption for religious hardship when, as here, waivers are granted on the basis of facially neutral, uniformly applicable standards that do not take into account religious or other beliefs." *Browne* BO 7 (emphasis original). As fully elaborated in the petition in this case, however, Congress' decision to grant exemptions to the failure-to-pay penalty for "reasonable cause," App. D1, and to the failure to pay estimated tax penalty for "unusual circumstances" which render its imposition "against equity and good conscience," App. D2, are precisely the individualized type of exemptions which this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), said may not exclude "religious hardship" without "compelling reason." *Id.* at 884. *See* Pet. 22-29.

Although the adopted brief in opposition claimed that exemptions are available "only upon the occurrence of specific circumstances beyond the individual's control," *Browne* BO 8, the respondent's own published policy belies that assertion. The Internal Revenue Manual provides that:

> Any sound reason advanced by the taxpayer as the cause for delay in ... paying a tax when due ... will be carefully analyzed to determine whether the applicable penalty should be asserted.

IRM 1218, IRS Policy P-2-7 (App. D9); *see generally* Pet. 26-27 & App. D8-D12. The Internal Revenue Manual lists as "examples of sound causes" a "death or serious illness" in the taxpayer's immediate family. App. D9.

The taxpayer's own death or illness might make compliance impossible, but a taxpayer's attention to a relative's death or illness only reflects a matter of making a pressing but voluntary decision among priorities. The respondent's claim that religious exercise involves only free choice, and that voluntary choices never constitute "reasonable cause" is belied by examples such as this. The respondent's argument merely serves to justify the kind of discriminatory exclusion of religious reasons that RFRA and the Free Exercise Clause prohibit.

This Court should grant certiorari to require courts to apply RFRA according to its terms to all federal agencies, including the Internal Revenue Service, and to demonstrate that the post-*Smith* equal-consideration Free Exercise test, based on *Sherbert*, cannot be limited to unemployment cases.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in her Petition, ROSA C. PACKARD prays that this Court grant her petition for a writ of certiorari, and reverse the judgment below.

Respectfully submitted,

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